EDITOR'S NOTE

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87-6573

87-6573

UNITED STATES SUPREME COURT

DOCKET NO.:

LARRY LEWIS

VERSUS

UNIVERSAL FABRICATORS, INC.

ORIGINAL

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW INTO COURT, through undersigned counsel, comes LARRY LEWIS, Plaintiff in the above captioned matter, who respectfully represents that:

That petitioner is indigent and without means to either pay the costs of this action as they accrue or in advance and desires to file these proceedings in forma pauperis.

Michael D. Skinner
MICHAEL D. SKINNER
ATTORNEY FOR PETITIONER

Supreme Court, U.S.
FILED
FEB 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

AFFIDAVIT TO ACCOMPANY MOTION FOR
LEAVE TO APPEAL IN FORMA PAUPERIS

United States Supreme Court

Larry Lewis

v. No.

Universal Fabricators, Inc.

Affidavit in Support of Motion to Proceed on Appeal
in Forma Pauperis

I, Larry Lewis being first duly sworn, depose and say that I ~~and~~ am the plaintiff/appellant, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on petition for certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.
   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.
      July 6, 1984 - approximately $900.00 per month
2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No
   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.
3. Do you own any cash or checking or savings account? No
   a. If the answer is yes, state the total value of the items owned.
4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No
   a. If the answer is yes, describe the property and state its approximate value.
5. List the persons who are dependent upon you for support and and state your relationship to those persons.

   Four Children:
   Tana Nichol Lewis (born May 13, 1979)
   Larry Lewis, Jr. (born October 13, 1980)
   Lance Lewis (born April, 1986)
   Dexter Lewis (born February, 1987)

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Larry Lewis

SUBSCRIBED AND SWORN TO before me this 4 day of February, 1988.

NOTARY PUBLIC

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

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SUPREME COURT, U.S.

IN THE UNITED STATES SUPREME COURT

1987 - 1988 TERM

DOCKET NO:

LARRY LEWIS

VS.

UNIVERSAL FABRICATORS, INC.

and

MODULAR QUARTERS, INC.

ON APPEAL
THE SUPREME COURT OF THE
STATE OF LOUISANA
DOCKET NO.: 87-C-1907
ALTERNATIVELY ON WRIT OF CERTIORARI FROM
THE SUPREME COURT OF THE
STATE OF LOUISIANA

JURISDICTIONAL STATEMENT
ALTERNATIVELY PETITION FOR WRIT OF CERTIORARI

RESPECTFULLY SUBMITTED:

MICHAEL D. SKINNER
ATTORNEY FOR PETITIONER
666 JEFFERSON ST.
P. O. DRAWER 3366
LAFAYETTE, LA 70502
(318) 237-6666

A.

QUESTIONS PRESENTED FOR REVIEW

The question presented for review in this case is whether tort claim is brought by workers covered by the Longshoreman and Harbors Worker's Compensation Act, 33 USC 901 et seq (LHWCA), brought against third parties under State law are subject to State Workman's Comp statutory employer immunities. Particularly in this case the question is whether Louisiana Revised Statute 23:1061 applies to the Plaintiff in the present case when the Plaintiff was receiving Longshoremen and Harbor Workers benefits under the LHWCA.

B.

LIST OF PARTIES

1) LARRY LEWIS, Plaintiff-Applicant

2) UNIVERSAL FABRICATORS, INC., Defendant-Respondant

3) MODULAR QUARTERS, INC., Defendant - Respondant

4) Abbeville Lumber Company - Defendant - Respondant

C.

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Motion for Leave to Proceed In Forma Pauperis

Order for In Forma Pauperis

Copy of Notice of Appeal

Certificate of Service of the Notice of Appeal

Affidavit of Notice of Appeal (Mailing to Supreme Court of Louisiana)

Certificate of Service

Affidavit of Timely Filing

In Forma Pauperis Application

D.

REFERENCE TO THE OFFICIAL AND UNOFFICIAL
REPORTS OF ANY OPINIONS DELIVERED IN THE COURT
OR ADMINISTRATIVE AGENCY

1) SIXTEENTH JUDICIAL COURT
PARISH OF IBERIA
STATE OF LOUISIANA

Granting Summary Judgment dismissing Petitioners claim against Universal Fabricators, Inc.

2) THIRD CIRCUIT COURT OF APPEALS
STATE OF LOUISIANA

Judgment refusing to over rule the judgment granting Summary Judgment dated June 8, 1987.

3) THIRD CIRCUIT COURT OF APPEALS
STATE OF LOUISIANA

Refusal of the Third Circuit to grant rehearing date of July 15, 1987.

4) SUPREME COURT
STATE OF LOUISIANA

Judgment refusing to grant Writ of Certiorari and Review dated November 6, 1987.

E.

GROUNDS FOR JURISDICTION

i) Date of the judgment or decree - November 6, 1987
Judgment of the Supreme Court of Louisiana refusing to grant Writ of Certiorari and review Judgment of Third Circuit Court of Appeals, State of Louisiana.

ii) Jurisdiction of this Honorable Court is granted under 28 USC 1257 (1) or alternatively 28 USC 1257 (3).

Louisiana Revised Statute 23:1061

Where any person (in this section referred to as principal) undertakes to execute any work, which is a part of his trade, business or occupation or which he had contracted to perform, and contracts with any person (in this section referred to as contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the princpal, the principal shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; and where compensation is claimed from, or proceedings are taken against, the principal then, in the application of this Chapter reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the employee under the employer by whom is is immediately employed.

Where the principal is liable to pay compensation under this section, he shall be entitled to indemnity from any person who independantly of this Section would have been liable to pay compensation to the employee or his dependent, and shall have a cause of action thereof.

Louisiana Revised Statute 23:1032

The rights and remedies herein granted to an employee or his dependant on account of any injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations, against his employer, or any principal or any officer, director, stockholder, partner or employee of such employer or principal, for said injury or compensable sickness or disease. For purposes of this Section, the work "principal" shall be defined as any person who undertakes to execute any work which is a part of his trade, business or occupation in which he was engaged at the time of the injury, or which he had contracted to perform and contracts with any person for the execution thereof.

Nothing in this Chapter shall affect the liability of the employer, or any officer, director, stockholder, partner or employee or such employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act.

The immunity from civil liability provided by this Section shall not extend to: 1) any officer, director, stockholder, partner or employee of such employer or principal who is not engaged at the time of the injury in the normal course and scope of his employment; and 2) to the liability of any partner in a partnership which has been formed for the purpose of evading any of the provisions of this Section.

33 USC 905 A

a) Employer liability, failure of employer to secure payment of compensation:

The liability of an employer prescribed in section 904 of this title shall be exclusivce and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such

injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servantt, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

G.

STATEMENT OF THE CASE

The subject matter of this case is personal injury which occurred to Plaintiff on July 6, 1984 while he was in the course and scope of his employment with 4-D Corrosion Control Specialists, Inc. The Plaintiff was employed as a painter-laborer and was working at the Port of Iberia at the shipyard of Universal Fabricators, Inc. (Unifab). He was engaged in repairing an offshore structure at the time of the accident. As a result of his injuries, Plaintiff is unable to work and has been receiving payments in accordance with the schedule of the Longshoreman and Harbor Workers Compensation Act, 33 U.S.C.A 901 et seq.

On July 5, 1985 Plaintiff brought suit against Unifab and Modular Quarters, Inc., a subcontractor also working for Unifab at the time of the accident. Subsequently, on January 13, 1986 Plaintiff added Abbeville Lumber Company to the suit. Plaintiff alleges that the Defendants are jointly and severally liable to him through their joint negligence in causing his injuries.

Unifab and Modular Quarters both have filed Motions for Summary Judgment in this matter. Each Defendant in its Motion of summary Judgment alleges there was no genuine issue as to material fact in the case and it was, therefore, entitled to a Summary Judgment in this matter. The Hearings on both Motions for Summary Judgment were originally set for April 1, 1986. At the same time, Plaintiff's counsel called counsel for Modular Quarters and requested a continuance of this hearing date since discovery was as yet incomplete and the Motion for Summary Judgment premature; the continuance was verbally granted and a Motion to Continue was filed. However, inadvertently he failed to ask counsel for Unifab also for the continuance. The Hearing was held and the Motions for Summary Judgment was granted.

In the brief and arguments to the Court on the Motion for Summary Judgment, Unifab argues that it was the statutory employer of the Plaintiff under Louisiana Revised Statutes 23:1061. However, Unifab did not mail the Brief to Plaintiff's attorney until March 27, 1986, the day before Good Friday, and Plaintiff's attorney did not receive the Brief and Supporting Documents until Wednesday, April 2, 1986, the day after the hearing was held.

It was from the granting of the Motion of Summary Judgment in favor of Unifab that Plaintiff, appellant, brought his appeal to the Third Circuit Court of Appeals of the State of Louisiana. The Appeallant assigned several assignments of error on appeal. The one pertinent to the case, at this time, is the second assignment of error which was that the trial court erred in granting a Summary Judgment in this matter as there were material facts presented to the Court in the depositions as to whether the Plaintiff was or was not a Longshoreman receiving benefits under the LHWCA. If the Plaintiff were indeed a Longshoreman, counsel argued that the Louisiana statutory employer immunities to tort contained at Louisiana Revised Statutes 23:1061 did not apply. The Court of Appeals of the Third Circuit of Louisiana upheld judgment of the trial court on the Motion for Summary Judgment chose to follow the holding of the Fourth Circuit Federal Court of Appeals in the case of GARVIN versus ALUMAX OF SOUTH CAROLINA, INC. , 787 f.2d 910 (4th Cir., 1986) and not to follow the United States Fifth Circuit in JENKINS versus MCDERMOTT, 734 f.2d 229 (5th Cir., 1984), and GATES versus SHELL OIL, 812 f.2d 1509 (5th Cir., 1987). A re-hearing was requested from the Louisiana Third Circuit Court and refused on July 15, 1987 and then Writs were requested from the Louisiana Supreme Court and refused on November 6, 1987.

H.

STAGE PROCEEDINGS IN WHICH FEDERAL QUESTION WAS FIRST RAISED

The stage in which the Federal question was first raised in this matter was at the time of the appeal, because in this case the Plaintiff was unable to raise the matter at the trial court level as he was unaware that Motion for Summary Judgment was to be heard on the day that it was heard. However, the evidence available to the trial Judge at the time of the Hearing did indicate that the Plaintiff was receiving Longshoreman and Harbor Workers benefits. It has always been the Plaintiff's contention that the trial court Judge was required to consider the effect of the provisions of the Longshoreman and Harbor Workers Compensation Act on the Statutory Employer immunities granted by the Louisiana Workmen's Compensation Law. Plaintiff stated in his deposition; which was before the trial court, that he was receiving Longshoreman and Harbor Workers benefits.

On appeals, both in the original Louisiana Appeals Court and the Louisiana Supreme Court, the Plaintiff made the argument that because he was a Longshoremen covered by the Longshoremen and Harbors Workers Act that the immunities granted under the Louisiana Workmen's Compensation Statutes to statutory employers were not applicable in his tort claim against the third party general contractors.

J.

STATEMENT OF CASE

ARGUMENT

The Plaintiff-Applicant contends that the Writ of Certiorari should be granted in the present case because there is a split in the decisions of the U.S. Court of Appeals between the 4th Circuit and the 5th Circuit on the applicability of State statutory employer immunities to Longshoreman and Harbor Workers suits against third parties for negligence. The 4th Circuit Court of Appeals has held that the State statutory immunities apply to suits by Longshoremen against third parties for negligence and the 5th Circuit Court of Appeals has twice held that they do not.

Also, there is a direct conflict between the United State Fifth Circuit and the Louisiana State Courts over the meaning of the identical statutory provisions, those being 33 USC 905 (a) and Louisiana Revised Statute 23:1061, both of which define employers for the respective workmen compensation acts.

The United States Fifth Circuit twice receptly has addressed the issue of whether the Louisiana Statutory employer immunities granted under R.S. 23:1061 apply to workers covered by the Longshoremen and Harbor Workers Act, 33 USC 901 et seq. The first time was in JENKINS versus MCDERMOTT 734 f.2d 229 (5th Cir., 1984), the second time was in GAIES versus SHELL OIL 812 f.2d 1509 (5th Cir., 1987).

JENKINS (Supra) was a diversity case involving an employee similarily situated to the Plaintiff in the present case. Either the Louisiana Workmans Compensation Statute or the Federal Longshoreman and Harbor Workers Statute might apply to the Plaintiff. Judge Tate running for the Fifth Circuit, in JENKINS (Supra) stated that the Louisiana Statutory employee defenses could not survive an election of the Federal remedy by the employee even though in this case it was not clear that the employee, as of the time of the trial of the case on the Motion for Summary Judgment, had actually elected benefits under either statute. The Court stated that the Legislatively intended uniformity treatment of maritime and amphibious workers regardless of situs would be thwarted if different remedies would be provided to workmen injured in the performance of identical employment depending on where the injury was sustained.

GAIES versus SHELL OIL case (supra) involved a worker on an offshore platform located on the Outer Continental Shelf. The employer was covered by the Longshoremen and Harbor Workers Act because of the provisions of the Outer Continental Shelf Lands Act, 43 USC 1333 (b). Louisiana Tort Law was applicable to the worker's cause of action against third parties because of 43 USC 1333 (a) (2) (A). The Fifth Circuit, however, found that the Louisiana Workmens Compensation statute was inapplicable because it conflicted with Federal law and that the Longshoremen and Harbor Workers Act was expressly applicable. The Court found that the Louisiana Statutory employer immunity was part of Louisiana Workmens Compensation statute and that it expressly conflicted with the Longshoremen and Harbor Workers Act. Therefore, the statutory employer immunities did not apply.

The United States Fourth Circuit in the GARVIN versus ALUMAX OF SOUTH CAROLINA,INC.,787 f.2d 910 (4th Cir., 1986) (supra) reached the opposite conclusion in regards to the applicability of a South Carolina statutory employer immunities made tort suit by a Longshoreman against a third party. The Fourth Circuit found that the South Carolina statutory employer immunities were applicable to that Longshoreman suit. The Louisiana Supreme Court by refusing to overturn the Louisiana Appeals Court's decision in the present case follows the Fourth Circuit's decision. The Louisiana Appeals Court in its written opinion expressly cited the Garvin

decision and expressly chose to follow it and not the Fifth Circuit's decision in Jenkins (supra).

There exist now not only a split between the Federal Fourth and Fifth Circuit but also between the Louisiana Courts and the United States Fifth Circuit. This creates a situation where the rights of a Longshoreman depend on which jurisdiction he sues in. Not only as between South Carolina and Louisiana but also between a Louisiana Court and a Federal Court situated in Louisiana.

In Louisiana a workers rights to sue a third party could depend on whether he is in Federal Court or State Court. A defendants rights could depend on whether he has the diversity of citizenship from the Plaintiff or not.

This Honorable Court is the only Court that can resolve the conflicts between the Federal Circuits and between the Louisiana Courts and the Fifth Circuit. Also this case presents this Honorable Court a chance to interpret the effect of Congress' 1984 amendment to 33 USC 905 (a). Especially the effect of this amendment on the right on Longshoremen suits against third parties claiming to be statutory employers under State laws. Also presents this Court with an opportunity to define the nature of a Longshoreman's third party action or negligence.

The Supreme Court of the State of Louisiana

LARRY LEWIS

VS. NO. 87-C - 1907

MODULAR QUARTERS, et al

IN RE: Lewis, Larry; Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Third Circuit, Number CA86-0547; Parish of Iberia 16th Judicial District Court Div."E" Number 58185-E

November 6, 1987

Denied.

JAD

WFM

JCW

LFC

CALOGERO & LEMMON, JJ., would grant the writ.

Supreme Court of Louisiana
November 6, 1987

Clerk of Court
For the Court

RECEIVED NOV 1 1 1987

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

LARRY LEWIS

v.

MODULAR QUARTERS, ET AL.

No. 86-547

BEFORE: JUDGES DOMENGEAUX, KNOLL, DOUCET

ORDER

The Application for Rehearing herein having been duly considered:

IT IS ORDERED that a Rehearing be, and the same is hereby, DENIED

Lake Charles, Louisiana, this 15TH day of JULY, 19 87

J.E.D
J.T.K
W.E.D, Jr

Judges

Filed JULY 15, 19 87

Kenneth J. deBlanc
Clerk

NUMBER 86-547

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

JUN 8 - 1987

LARRY LEWIS

Plaintiff - Appellant

VERSUS

MODULAR QUARTERS, ET AL

Defendant - Appellee

On appeal from the Sixteenth Judicial District Court for the Parish of Iberia, State of Louisiana, the Honorable Richard T. Haik, Judge, presiding.

Before: DOMENGEAUX, DOUCET, and KNOLL, JJ.

DOUCET, Judge.

Plaintiff, Larry Lewis, filed suit for damages incurred as a result of injuries sustained in a work-related accident. Named as defendants were Modular Quarters, Inc. (Modular), Universal Fabricators, Inc. (Unifab), and Abbeville Lumber Co., Inc. A summary judgment was granted in favor of Unifab and plaintiff now appeals.

Plaintiff was employed by 4-D Corrosion Control (4-D) at the time of the accident in question. 4-D is engaged exclusively in the work of sandblasting and painting. Unifab is engaged in the fabrication and refurbishing of oil field structures and had contracted with 4-D to perform some sandblasting and painting work on a

two-story living quarters unit with a heliport attached to the top of the second story. The unit was located in Unifab's forty-acre yard. [1]

On the day of the accident, July 6, 1984, plaintiff and other 4-D employees spent the morning setting up sandblasting equipment to sandblast the underside of the heliport. A stairway was attached to the side of the two-story unit leading to the heliport. As plaintiff was walking up the stairway, he tripped and fell about 15 feet to the ground below. He claims that a railing which would have prevented his fall was missing from a section of the stairway. Plaintiff began receiving benefits under the Longshore and Harbor Worker's Compensation Act and subsequently filed this suit on July 5, 1985.

Depositions were taken of the plaintiff and two employees of Unifab, David Berard and Joseph Zagar. Following the depositions, Modular and Unifab filed separate timely motions for summary judgments which both were set to be tried on April 1, 1986.

Although the record does not reflect it, counsel for plaintiff claims that prior to April 1, he contacted counsel for Modular and they agreed to continue the hearing on the motion for summary judgment. Counsel for plaintiff apparently neglected to contact counsel for Unifab to request a similar continuance. Referring to his request for a continuance regarding Modular's motion, counsel for plaintiff states in his brief on appeal, "the Continuance was verbally granted and a Motion to Continue was filed." The record contains no indication that the trial

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[1] The activities of Modular and Abbeville Lumber Co., are not relevant to the issues presented in this case.

court verbally granted a continuance and the only motion to continue that is contained in the record was filed and denied on April 9, 1986, eight days after the court granted Unifab's motion for summary judgment.

In his brief on appeal, counsel for Unifab states that it filed a pre-trial memorandum on March 27, 1986, briefing the issues to be argued at the April 1 hearing. However, counsel for plaintiff claims he did not receive a copy of the memorandum until April 2. The record does not contain the memorandum nor any indication that it was ever filed with the court. In any case, the hearing was held on April 1, 1986, and Unifab's motion for summary judgment was granted. The minutes of court for April 1 indicate that only counsel for Unifab was present.

The record does not contain any written reasons for judgment. However, it is apparent from the briefs on appeal submitted by plaintiff and Unifab that the trial court found that the pleadings and depositions [2] showed that there was no genuine issue as to the fact that Unifab was the statutory employer of plaintiff and therefore his exclusive remedy under Louisiana law was limited to worker's compensation benefits and Unifab was immune from suit in tort by plaintiff.

On appeal plaintiff asserts three assignments of error. He first contends that the trial court erred in granting a summary judgment because Unifab did not file a pre-trial memorandum at least five days prior to the April 1

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[2] No affidavits were filed by either party.

hearing on the motion as required by Rule 3.1 of the Sixteenth Judicial Court.

It is well settled under Louisiana jurisprudence that local rules of court are binding upon litigants and the court. Brumfield v. Brumfield, 178 So.2d 379 (La. App. 1st Cir. 1965), writ denied, 248 La. 435, 179 So.2d 274 (1965). However, it is equally well settled that an appellate court may not take cognizance of local rules of court. To be considered they must have been introduced in evidence and be found in the record on appeal. Bryant v. Travelers Insurance Co., 288 So.2d 606 (La. 1974); Trahan v. Petroleum Casualty Company, 200 So.2d 6 (La. 1967). It is not contended that a copy of Rule 3.1 of the Sixteenth Judicial District Court was ever filed in evidence and we are unable to recognize it of our own accord. We therefore find no merit to this assignment of error.

Plaintiff next contends the trial court erred in granting a summary judgment in this case because there was a genuine issue as to whether or not Unifab was the statutory employer of plaintiff.

Summary judgments are provided for by LSA-C.C.P. art. 966 which reads in pertinent part:

"A. The plaintiff or defendant in the principal or any incidental action, with or without supporting affidavits, may move for a summary judgment in his favor for all or part of the relief for which he has prayed. The plaintiff's motion may be made at any time after the answer has been filed. The defendant's motion may be made at any time.

B. The motion for summary judgment shall be served at least ten days before the time specified for the hearing. The adverse party may serve opposing affidavits prior to the date of the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law."

LSA-R.S. 23:1061 provides that:

"Where any person (in this section referred to as principal) undertakes to execute any work, which is a part of his trade, business, or occupation or which he had contracted to perform, and contracts with any person (in

this section referred to as contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; and where compensation is claimed from, or proceedings are taken against, the principal, then, in the application of this Chapter reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the employee under the employer by whom he is immediately employed.

Where the principal is liable to pay compensation under this Section, he shall be entitled to indemnity from any person who independently of this Section would have been liable to pay compensation to the employee or his dependent, and shall have a cause of action therefor."

LSA-R.S. 23:1032 provides in pertinent part:

"The rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations, against his employer, or any principal or any officer, director, stockholder, partner or employee of such employer or principal, for said injury, or compensable sickness or disease. For purposes of this Section, the word "principal" shall be defined as any person who undertakes to execute any work which is a part of his trade, business or occupation in which he was engaged at the time of the injury, or which he had contracted to perform and contracts with any person for the execution thereof."

Simply stated, under the circumstances described in LSA-R.S. 23:1061, where Unifab is the principal, 4-D is the contractor, and plaintiff is the employee (of 4-D); Unifab is immune from a suit by plaintiff in tort. In such a situation, Unifab would be considered the "statutory employer" of the plaintiff. For summary judgment purposes the question of whether or not Unifab was the "statutory employer" of plaintiff is one of material fact.

In the recent case of Berry v. Holston Well Service, Inc., 488 so.2d 934 (La. 1986) the Supreme Court summarized the general rules used to determine whether a statutory employment relationship exists:

3 From reading of *Benson* and its progeny the following general rules or method of analysis can be gleaned. Basically, a determination of whether a statutory employment relationship exists involves a three level analysis. In the first level, the primary focus is on the scope of the contract work. "The specific task to which an individual employee is put should not be determinative of his coverage under the Act. Instead, the entire scope of the work contract must be considered." *Lewis, supra*, citing Malone, Principal's Liability for Workmen's Compensation to Employees of Contractors, 10 La.L.Rev. 25 (1949). The central question to be answered is whether the contract work is specialized or non-specialized. This of course is a question of fact, and courts should consider whether the contract work requires a degree of skill, training, experience, education and/or equipment not normally possessed by those outside the contract field. If it is determined that the contract work is *specialized per se*, as a matter of law the work is not a part of the principal's trade, business or occupation, and the principal is not the statutory employer of the specialized contractor's employees. In this situation, "the purpose behind the rule is not violated and the reason for holding the principal directly liable in compensation exclusively does not come into play" because the contractor is an independent business enterprise, rather than a mere intermediary interposed to avoid compensation responsibility. *Williams v. Shell Oil Co.*, 677 F.2d 506 (5th Cir.1982) (Tate, J. writing for the panel), citing 13 W. Malone & H. Johnson, La.Civil Law Treatise—Worker's Compensation, §§ 78, 126 (1980).

'If it is determined that the contract work is non-specialty, then the inquiry shifts to a comparison of the principal's trade, business or occupation and the contract work to see if the latter can be considered a part of the principal's trade, business or occupation. The jurisprudence has forged several guidelines, in no way exhaustive, which can aid a court in resolving this factual issue:

(1) Is the contract work routine and customary? That is, is it regular and predictable? Nonrecurring or extraordinary constructions and repairs usually are outside the scope of the statute. On the other hand, general maintenance and repair work, which by their very nature allow the smooth and continued operation of the principal, are within the scope of coverage. *Lewis, supra; Benson, supra; Berman, supra; Rowe v. Louisiana & Arkansas Railway Co.*, 282 So.2d 503 (La.1973).

(2) Does the principal have the equipment and/or manpower capable of performing the contract work? This is a sub-species of the specialty inquiry, *supra*. Here the primary focus is on determining whether the contract work as relates to the principal is handled ordinarily through employees. *Lewis, supra*, citing 1C. A. Larson, The Law of Workmen's Compensation, § 49.12, at 9-41 (1982).

(3) What is the practice in the industry relative to the contract work? Do industry participants normally contract out this type of work or do they have their own employees perform the work? See *Rowe, supra; Brown v. Kaiser Aluminum and Chemical Corp.*, 289 So.2d 534 (La.App. 1st Cir.1973), *writ not considered* 293 So.2d 171 (La.1974); Malone & Johnson, *supra*, § 126, pp. 253-53, fn. 91.

'These guidelines are not absolute or rigid, but are instead to be applied relatively, taking into consideration the size, complexity, integration (either horizontal or vertical), or the lack thereof, etc. of the principal. What may be nonrecurring to a small concern, may for an industry giant be regular. Similarly while the type of contract work may be non-specialized (i.e. manual labor), for a small concern it may well be beyond the expertise or capability of its employees. 1 A. Larson, Workmen's Compensation for Occupational Injuries and Death, § 49.13 (Desk ed. 1985). Basically, the factors developed by the jurisprudence strive to answer the overriding question of "whether [the contract work] is, *in that business*, normally carried on through employees rather than independent contractors." *Id.* (emphasis added)

'Lastly, the court must determine if the principal is engaged in the work at the time of the alleged accident. La.R.S. 23:1032. At this level "(i)t is irrelevant that the principal has the financial resources or expertise to enter into a particular trade, business or occupation. In order for any person to come within the scope of the

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3 The following cases were cited in an unquoted portion of Berry, supra, and are referred to by "supra" in this quoted portion of the opinion: Rowe v. Northwestern National Ins. Co., 471 So.2d 226 (La. 1985); Lewis v. Exxon Corp., 441 So.2d 192 (La. 1983); Benson v. Seagraves, 436 So.2d 525 (La. 1983); Barnes v. Sun Oil Co., 362 So.2d 761 (La. 1978); Berry v. Holston Well service, Inc., 467 So.2d 90 (La. App. 3rd Cir. 1985).

statute, he is engaged in the enterprise at the time of the injury." *Lewis, supra.*

"Armed with a full understanding of the reasoning process presently used by this Court in determining whether a statutory employment situation exists, our opinions are logically consistent.[4] Both *Benson* and *Rowe* are specialty cases. In *Rowe*, we held that while routine maintenance activities of the pump were part of the trade, business or occupation of Cargill, the disconnection and reconnection of the pump to high voltage electricity, certainly necessary for the routine maintenance to be performed, was not within the skill, training or expertise of Cargill employees. Thus it is clear that the work of the contract electrician was beyond the scope of the regular maintenance activities. Because of the dangerous and specialized nature of the high voltage disconnection and reconnection, Cargill was required to hire a specialty contractor. As the court of appeal appropriately pointed out, our holding that the employee of the specialty contractor was not the statutory employee of Cargill was no more than "a reiteration and rearticulation of the jurisprudential rule of law found in *Louis (sic) v. Exxon, supra*, and *Benson v. Seagroves, supra.*" *Berry*, 479 So.2d at 948. *Benson* is similar. There the injured employee was engaged in electrical planning and design, certainly specialty areas, requiring a degree of training not normally found beyond the special field.

(Footnotes omitted)

David Berard is an employee of Unifab whose responsibilities include managing the living quarters section in the power equipment division and project engineering. Joseph Zagar is Unifab's corporate secretary, an estimator, a project engineer, and is in charge of sales. Both Mr. Berard and Mr. Zagar stated that sandblasting and painting were a part of the regular work performed by Unifab on a day-to-day basis. Both stated that Unifab maintains a regular work crew of ten men, including a foreman, who sandblast and paint and that Unifab owns and maintains its own sandblasting and painting equipment.

In response to a subpoena duces tecum Mr. Zagar brought several documents with him when he was deposed. These documents were attached to his deposition and are found in the record. A partial payroll record shows nine full-time employees with a particular code next to their names which Mr. Zagar stated categorizes them as sandblasters and painters. The foreman of the crew was not listed. In addition, Unifab price schedules list rates for personnel and equipment for onshore and offshore work. Both schedules contain a description of sandblaster/painter with the applicable rates listed. Mr. Zagar stated that Unifab employs outside contractors to sandblast and paint when the workload requires it. The plaintiff confirmed that Unifab employed their own sandblasting and painting crew and stated that Unifab's crew was working elsewhere in the yard on the day of his accident.

We find that the "contract work", sandblasting and painting, performed by 4-D for Unifab is non-specialized. Sandblasting and painting do not require a degree of skill, training, experience, education, and/or equipment not normally possessed by those outside of the contract field. This is clearly evidenced by Unifab's employment of a regular sandblasting and painting crew and the ownership and maintenance of its own equipment. The major piece of equipment needed for both sandblasting and painting is an air compressor. The actual sandblasting and painting requires no significant degree of skill or training. The employees of Unifab engaged in this type of work received an hourly wage of $7.50 which is not indicative of a job requiring significant skill, training, or experience. The sandblasting and painting work performed for Unifab by 4-D is not at all

the type of work that the Berry, supra, court has labeled specialized.

The aforementioned evidence clearly shows that the "contract work", sandblasting and painting, is a part of Unifab's trade, business, or occupation under LSA-R.S. 23:1032, 23:1061, and the applicable jurisprudence, including Berry, supra. That evidence also establishes that Unifab was engaged in the work of sandblasting and painting at the time of plaintiff's accident and injury.

A review of the law and evidence leaves us with the firm opinion that there was no genuine issue as to the existence of a "statutory employer" relationship between plaintiff and Unifab. Unifab was the "statutory employer" of plaintiff at the time of his accident.

By plaintiff's last assignment of error he contends that the trial court erred in granting the summary judgment because there was a genuine issue as to whether the plaintiff was a longshoreman for purposes of the Longshore and Harbor Worker's Compensation Act (LHWCA), 33 U.S.C. §901 et seq.

Plaintiff argues that this is a material fact because if he is covered under the LHWCA then the "statutory employer" immunity provided under the Louisiana Worker's Compensation Law, LSA-R.S. 23:1021 et seq., does not apply in this case.

The only reference to coverage under the LHWCA contained in the record is plaintiff's deposition statement that he is receiving compensation benefits under the LHWCA. Since the trial judge did not favor us with reasons for judgment we cannot determine for certain whether or not he considered this issue. However, in his brief on appeal

plaintiff states that the issue of LHWCA coverage was not mentioned in Unifab's pre-trial memorandum which purportedly covers the issues addressed at the hearing on the motion for summary judgment. Although this issue was only raised by several sentences in plaintiff's deposition it should have been considered by the trial court in ruling on Unifab's motion. We feel it was more or less a "hidden" issue not considered by the trial court in ruling on Unifab's motion.

§§904(a) and 905(a) of the LHWCA, as in effect on July 6, 1984 [4], the date of plaintiff's accident, provide that a general contractor such as Unifab is immune from a suit in tort filed by an employee of a subcontractor only when the general contractor has secured payment of compensation benefits. See Washington Metropolitan Area Transit Authority v. Johnson, 467 U.S. 925, 104 S. Ct. 2827, 81 L.Ed. 2d 768 (1984). In the instant case the LHWCA compensation benefits being received by plaintiff appear to have been secured by 4-D as plaintiff stated in his deposition that his compensation claim had been filed with 4-D's insurer. In such a case, Unifab clearly is not immune from a suit in tort by plaintiff under the provisions of the LHWCA. The conflict between the provisions of the Louisiana Worker's Compensation Law, specifically the "statutory employer" immunity provided by LSA-R.S. 23:1032 and 23:1061, and the federal LHWCA is obvious.

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[4] §§904(a) and 905(a) were amended in September 1984 to provide such immunity to general contractors only when they are required to secure payment of compensation in cases where the subcontractor fails to do so.

It was settled by the U.S. Supreme Court in Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed. 2d 458 (1980), that the LHWCA is to be applied concurrently with state worker's compensation schemes. Sun Ship, however, concerned five injured workers who wished to pursue their compensation remedies under the Pennsylvania worker's compensation scheme rather than the LHWCA. The U.S. Supreme Court upheld the state court decisions allowing the five to pursue their state remedies.

In support of his position that the provisions of the LHWCA should apply rather than the state provisions, plaintiff cites the U.S. Fifth Circuit Court of Appeals' decision in Jenkins v. McDermott, Inc., 734 F.2d 229 (5th Cir. 1984), vacated on other grounds, 742 F.2d 191 (5th Cir. 1984). In Jenkins, the plaintiff, who was employed by TAD, was injured while working at one of McDermott's oil platform construction sites pursuant to a contract between TAD and McDermott. The plaintiff claimed compensation benefits under the LHWCA and also sued McDermott in tort. The District Court granted a summary judgment in favor of McDermott on the grounds that plaintiff's work-injury did not fall within the coverage of the LHWCA but was covered by the Louisiana Worker's Compensation Law and McDermott as plaintiff's "statutory employer" was immune from a suit in tort by plaintiff.

Writing for the court, Judge Tate held that plaintiff's injury was covered under the terms of the LHWCA. Judge Tate also dismissed the notion that the idea of concurrent coverage of the state compensation scheme and the LHWCA required that the state "statutory employer" immunity defense apply to McDermott.

This holding is in accord with the decision rendered by the Louisiana Supreme Court in Poche v. Avondale Shipyards, Inc., 339 So.2d 1212 (La. 1976). Poche concerned two independent suits which were consolidated. One suit concerned a worker, Aldrich Adams, who sustained injuries while working for Avondale Shipyards, Inc. Adams filed a tort action against several executive officers and fellow employees of Avondale. At that time, LSA-R.S. 23:1101 of the Louisiana Worker's Compensation Law was interpreted to allow such suits. Adams was receiving compensation under the LHWCA. Under the LHWCA, however, the exclusive remedy available to an employee injured through the negligence of an officer or fellow employee was compensation.

The Supreme Court examined the legislative history surrounding the 1972 amendments to the LHWCA providing for the first time coverage to workers injured on land and determined that Congress intended that the LHWCA and state compensation schemes were concurrent.

The court found however, that since Adams was receiving compensation benefits under the LHWCA he had elected to pursue his remedy under the LHWCA. The court held that since the LHWCA did not allow a suit in tort against officers or fellow employees, the district court had properly dismissed Adams' negligence action. On rehearing, the court, in a per curiam opinion, held that Adams' acceptance of compensation benefits under the LHWCA did not establish that he made an election, or a choice, of LHWCA remedies. The court remanded the case to the district court "for the purpose of trying the issue of whether Adams elected federal benefits."

Unifab argues that it makes no difference whether or not plaintiff was a longshoreman and paid compensation benefits under the LHWCA or under the Louisiana Worker's Compensation Law because the "statutory employer" immunity applies in either case. In support of its position Unifab cites a U.S. Fourth Circuit Court of Appeals case, Garvin v. Alumax of South Carolina, Inc., 787 F.2d 910 (4th Cir. 1986).

In Garvin, supra, Alumax leased a ship terminal in South Carolina which was operated by plaintiff's employer. The plaintiff was injured working at the terminal and commenced receiving compensation benefits under the LHWCA. He subsequently instituted a tort action in federal court against Alumax. Alumax filed a motion to dismiss the suit on the grounds that under South Carolina law it was the statutory employer of the plaintiff and was immune from suit in tort by plaintiff. The district court denied the motion holding that LHWCA took precedence over state law and it offered no such immunity. The Fourth Circuit reversed finding that the LHWCA and the state statute were not repugnant and that Alumax was entitled to avail itself of the "statutory employer" immunity provided under South Carolina law.

We find that, even though it conflicts somewhat with the decisions in Jenkins, supra, and Poche, supra, the well-reasoned decision in Garvin, supra, more properly reflects the views of this court regarding the tension between the LHWCA and state worker's compensation schemes. In view of the history of the LHWCA as set forth by the U. S. Supreme Court in Sun Ship, supra, and the court in Garvin, we can discern no intent by Congress to negate the

available defenses provided by state law to third-party claims brought pursuant to state law. Plaintiff's claim against Unifab is clearly brought under state law - not federal law.

For the reasons assigned, we affirm the judgment of the trial court. Costs of this appeal are assessed against plaintiff-appellant.

AFFIRMED.